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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 265

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

THE POTTSVILLE BROADCASTING COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PETITION FOR CERTIORARI FILED AUGUST 5, 1939

CERTIORARI GRANTED OCTOBER 9, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. —

FEDERAL COMMUNICATIONS COMMISSION AND
SCHUYLKILL BROADCASTING COMPANY, INTER-
VENOR, PETITIONERS

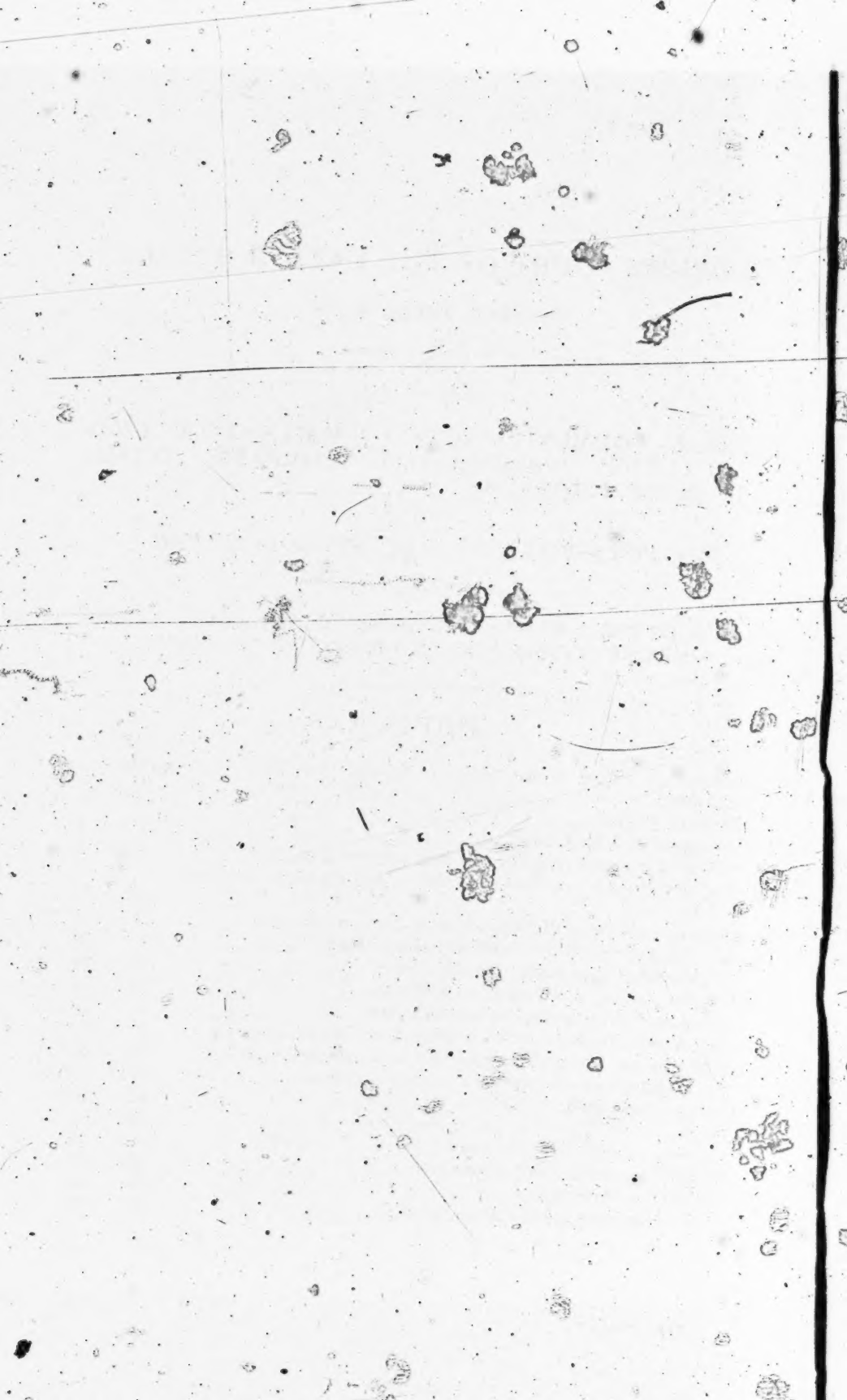
VS.

THE POTTSVILLE BROADCASTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In United States Court of Appeals for the District of
Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING
COMPANY, INTERVENER, APPELLEES

Appeal from the Federal Communications Commission

(Argued March 7, 1938. Decided May 9, 1938)

Eliot C. Lovett and Charles D. Drayton, both of Washington,
D. C., for appellant.

Hampson Gary, General Counsel, George B. Porter, Assistant General
Counsel, Fanny Neyman, Assistant Counsel, and Frank U.
Fletcher, all of Washington, D. C., for Federal Communications
Commission; and Arthur W. Scharfeld, Philip G. Loucks, and Jo-
seph F. Zias, all of Washington, D. C., for Schuylkill Broadcasting
Company.

Before GRONER, MILLER, and EDGERTON, JJ.

Opinion

GRONER, J.: This is an appeal from the Federal Communications
Commission.

The Pottsville Broadcasting Company, a newly organized Mary-
land corporation, applied to the Commission in May 1936 for a
permit to construct a local daytime broadcasting station in Potta-
ville, Pennsylvania. Charles D. Drayton, a lawyer in Washington
city, is president of the company. The other officers and directors
are residents of Pottsville. Prior to the application the company
organized and received subscriptions at \$10 each for 2,625 shares of
its capital stock. Drayton subscribed to 2,550 shares in the amount
of \$25,500. The remaining shares were distributed among the other
officers and directors. There is no question as to the financial ability
of all to comply with their several obligations.

The application was submitted by the Commission in the usual
course to one of its examiners, who in November 1936 recommended
that the application be granted. The examiner's findings of fact
were that the corporation was in all respects financially qualified to
operate the proposed station; that there was need of a local daytime
station at Pottsville; that its establishment would not result in ob-
jectionable interference; and that the program of entertainment, etc.,
appeared to be wholly satisfactory.

Some five months later, the Commission overruled the examiner's recommendation. The Commission found that there was need of a local station in Pottsville, sufficient financial patronage reasonably to assure its success, and sufficient local talent to support its service. But the Commission said it appeared from Drayton's testimony before the examiner that the payment of the corporate stock subscriptions was contingent upon the obtaining of an order of the Pennsylvania Securities Commission authorizing the issuance of the stock, and the Commission held that this contingency defeated any finding of financial ability in the applicant. In addition to this ground for denial of the license, the Commission said that the principal stockholder, Drayton, was not a resident of Pottsville, "had no definite plans for residing in that town, or spending a percentage of his time therein," and was not familiar with the needs of the listening audience in that region. The Commission also observed that the record established that "Drayton's interest in the proposed station was primarily for investment purposes."

The applicant appealed to this court under the provisions of Section 402 (b) (1) of the Act (47 U. S. C. A. 402 (b) (1)). The appeal is based on the alleged error of the Commission in assuming as a matter of law that the consent of the Pennsylvania Commission was essential to the validity of the proposed stock issue, and likewise on the alleged error of the Commission in holding that an applicant for a local station must be a resident of the community intended to be served and must be personally familiar with the local needs.

The Commission answers the first point with the statement that the finding as to the financial status of the company was based upon the testimony of Mr. Drayton himself and that the Commission was justified in accepting it as correct. The testimony of Drayton to which the Commission refers is:—"My own subscription consists of 2,550 shares at the total amount of \$25,500. This amount will be paid in immediately, if, and when, the present application is granted and the requisite order secured from the Pennsylvania Securities Commission. A similar situation exists as to the other subscribers." But as to this Drayton now says he was mistaken in his assumption that the subscription was not binding without the approval of the Pennsylvania Securities Commission and insists the Commission ought to have examined for itself the laws of Pennsylvania before making its conclusion based on such laws.

We have said on the subject that the applicant for a station permit assumes the responsibility of showing proper financial responsibility in order that the Commission may determine whether the grant of the license would be in the public interest, and we have no intention of modifying our position. But in the case now under consideration the evidence shows that the corporation was organized in Maryland and subscriptions to its stock in excess of its financial requirements for construction of the station were duly made. Undoubtedly those subscriptions were binding and lawful. Except, therefore, for the

incorrect supposition of Drayton that the consent of the Pennsylvania Commission was a condition precedent to the issuance and payment of the stock, it is obvious that the Commission would not have grounded its refusal to make the grant on the basis of financial inability. We say incorrect supposition because it is undoubtedly true, as the Commission in effect now concedes, that the validity of the stock subscriptions was in no respect dependent upon any action by the Pennsylvania Commission. In this view, it is obvious that

3 there was a mutual mistake, but one as to which the applicant no less than the Commission acted wholly in good faith. The Pennsylvania Act is intended to regulate the registration of stock and bond dealers and salesmen, and not to regulate the issuance of stock in circumstances like those present here. This clearly appears from the Act itself as well as from its interpretation by the Supreme Court of Pennsylvania. *Insuranshares Corp. v. Pennsylvania Securities Commission*, 298 Pa. 263, 148 Atl. 107; *Commonwealth v. Pastor*, 289 Pa. 22, 136 Atl. 862; *Bagley v. Cameron*, 282 Pa. 84, 127 Atl. 311. It may be, as the Commission insists, that there is no obligation on it to enter into an independent investigation of the requirements of the Pennsylvania Securities Act or to take notice of the statutes of one of the States and hence that the Commission is entitled to accept as true the evidence of the chief officer of the applicant in this respect; but we need not consider that question. If, as we think, both Mr. Drayton in his testimony and the Commission in its finding based on his testimony were in error, it would be a silly business to perpetuate the error and permit it to destroy the rights of the applicant in the instant controversy.

2 In that view, we are led to consider the other ground on which the Commission based its denial of the permit. This is, as we have seen, that Drayton is not a resident of Pottsville, is not familiar with its local broadcasting needs, and is interested in the proposed grant primarily for investment purposes. The Commission said:

"It is the opinion of the Commission that those who will control the policies of proposed new 'local' broadcast stations should show themselves to be acquainted with the needs of the area proposed to be served and to be prepared to meet that need."

The evidence taken before the examiner shows that Drayton, who organized the corporation and subscribed for all but a nominal amount of the stock, was, until just prior to the organization of the applicant corporation, a stranger to Pottsville; that he determined to apply for a license to operate a broadcasting station there largely as a sound business investment; and that he associated with him and brought into the new corporation a number of the leading citizens of that town in order to effectuate his purpose. One of the directors is the manager of the largest department store in Pottsville. Another is associated with the technical staff of the Bell Telephone Company of Pennsylvania. All are men of prominence, standing, and character in the community. It is quite true that their interests for the time being are more or less nominal, but Drayton testified that in associat-

ing them with himself in the new enterprise he anticipated and hoped that their financial interest would increase with the station's growth and expansion. There is nothing in the record to suggest that they are mere dummy directors. Their own evidence indicates the contrary and at least for the period of their services as directors they would have the same individual responsibility as Drayton in the conduct of the corporation's business. They at least, if anybody, know the local requirements.

This particular ground of refusal has never been presented to us before, but we know from the published reports of the Commission's decisions that on the question of the propriety of confining grants of a local nature to local people the Commission has not given any indication of the adoption of a fixed and definite policy. If the contrary of this were true, we should be slow to say that the establishment of such a policy would be either arbitrary or capricious. But the policy should be applied with substantial uniformity, and the lack of that uniformity in the past convinces us that the Commission has not sought to lay down a hard and fast rule. As applied here, this ground of refusal was obviously secondary rather than primary. It perhaps would not have influenced the Commission to the point of denying the license, except for what the Commission viewed as the lack of financial ability on the part of the applicant. Considering the record as a whole, and in view of the obvious good faith of the applicant and the subscribers to its stock, of the conclusion of the Commission that the establishment of the station is desirable and in the public interest, and of the manifest error which the applicant led the Commission into making, we think the interests of justice require that the case be sent back to the Commission solely that it may reconsider it. If the Commission should be of opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation, and should announce a policy with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas. We never have assumed, however, and do not intend now to assume, such supervisory control of questions of policy. We think it perfectly clear it is the intent of the statute that such matters should be left wholly in the hands of the Commission, and our remand in this case should be understood only as growing out of the feeling on our part that the controlling consideration in the Commission's disposition of this case was its erroneous view of the Pennsylvania law and that to perpetuate this error would be wrong.

The order of the Commission is, therefore, reversed at appellant's cost and the case remanded for reconsideration in accordance with the views expressed herein.

Reversed and remanded.

In United States Court of Appeals for District of Columbia

No. 7016. April Term, 1938

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING
COMPANY, INTERVENER

Judgment

May 9, 1938

Appeal from the Federal Communications Commission

This cause came on to be heard on the transcript of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission in this cause, be and the same is hereby, reversed at appellant's cost, and that this cause be and the same is hereby remanded to the said Federal Communications Commission for reconsideration in accordance with the views expressed in the opinion of this court.

Per Mr. Chief Justice GRONER.

MAY 9, 1938.

Mr. Justice Stephens took no part in the consideration or decision of this case.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Petition for writ of prohibition and for writ of mandamus

Filed July 2, 1938

*To the Honorable The Chief Justice and Associate Justices of the
United States Court of Appeals for the District of Columbia:*

Your petitioner, the Pottsville Broadcasting Company, respectfully
alleges:

I

In May 1936, your petitioner filed with the respondent, Federal Communications Commission, an application for a permit to construct a radio broadcasting station to operate daytime only in Pottsville, Pennsylvania. After full proceedings before and consideration by the

Commission upon and of all issues raised to enable a determination as to whether the granting of the application would serve the public interest, convenience, and necessity as required by the Communications Act, the Commission denied the application on the ground that, as a matter of law, the consent of the Pennsylvania Securities Commission was essential to the validity of the applicant's proposed stock issue but had not been obtained, thus disqualifying the applicant financially, and also that the majority stockholder of a corporate applicant for a "local" station must be a resident of the community intended to be served and must be familiar with the local needs, whereas in this case the majority stockholder was a nonresident and not personally familiar with local requirements, although the board of directors was clearly shown, as later found by this Court, to

7 "know the local requirements."

Thereupon, your petitioner took and prosecuted an appeal to this Court to reverse the said decision, and such proceedings were had on appeal that afterwards, on May 9, 1938, this Court rendered its judgment reversing the decision of the Commission. On May 27, 1938, this Court sent a certified copy of its judgment to the Commission and remanded the case for reconsideration in accordance with the views expressed in the opinion. It did not send it back for unrestricted reconsideration, the enlargement of the record, the inclusion of other parties, or the broadening of the issues. On the contrary this Court held that the Commission erred, as a matter of law, in assuming that the consent of the Pennsylvania Securities Commission was necessary to enable your petitioner to issue its subscribed stock, and thus eliminated any question of petitioner's financial ability, which, in the view of this Court, constituted the primary ground for the Commission's denial of the application. The sole reason for remanding the case was to enable the Commission to reconsider the secondary ground for its denial of the application, namely, as to whether the Commission might deem it in the public interest to announce a policy for uniform application "with relation to the grant of local station licenses, confining them to local people."

II.

On May 23, 1938, your petitioner filed with the Commission a petition for the granting of its application. It pointed out that the Commission had adopted no policy requiring a majority stockholder of an applicant corporation to be personally familiar with the needs of the area to be served, or to be a resident thereof. Furthermore, it was shown that petitioner's proposed station, according to the Commission's own rules and tested by the extent of the area to be served, is not a "local" but a "regional" station.¹ Therefore, the

¹ The petition, which was duly verified, contained the following paragraphs (pp. 11-12): "This application seeks a license to operate on 580 kilocycles with 250 watts power. Under the regulations of the Commission now in force that is designated as a 'regional' frequency and is allocated for use by regional stations. The operating power of such a station shall not be less than 250 watts, but during the daytime may be as much as 5,000 watts. (Rule 120.)" "The frequencies designated by the Commission's regulations as local frequencies and allocated for use by local stations, with a power of 100 watts during nighttime and not to

8 Commission's pronouncement, quoted in the opinion of this Court, that "those who will control the policies of proposed new 'local' broadcast stations should show themselves to be acquainted with the needs of the area to be served and to be prepared to meet that need" was inadvertent, and tended to mislead the Court, since it has no application to this case.

III

On May 13, 1938, a petition was filed with the Commission by the Pottsville News and Radio Corporation requesting that the Commission schedule oral argument upon its application and also upon that of your petitioner and of the Schuylkill Broadcasting Corporation, all three of which request identical facilities in Pottsville.

9 The Pottsville News and Radio Corporation did not file its application until more than six months after the filing of the Pottsville Broadcasting Company's application and more than one month after the Examiner's Report was released recommending the granting thereof. The Schuylkill Broadcasting Corporation did not file its application until twelve weeks after the Pottsville Broadcasting Company's application was filed, and six weeks after it was designated for hearing. Your petitioner filed an answer in opposition to the said petition of the Pottsville News and Radio Corporation challenging the jurisdiction of the Commission to proceed as requested and pointing out that "the uniform, consistent, and impartial administration of the Communications Act, as well as adherence to the decision of the Court of Appeals herein," required the denial of the petition and the granting of the application of the Pottsville Broadcasting Company. Among other things, your petitioner called attention to the fact that as late as April 20, 1938, the Commission granted an application (Northwestern Publishing Company, Docket No. 4177, for a permit to construct a new local-channel station to operate daytime only in Danville, Illinois) wherein the applicant was entirely owned by a foreign corporation of which the President and majority stockholder was a nonresident, and where there was no showing made that he was familiar with the needs of the area to be served.

exceed 250 watts during daytime, are as follows: 1200, 1210, 1310, 1370, 1420, and 1500 kilocycles. (Rule 121.)

"The authority of the Commission to classify radio stations, to prescribe the nature of the service to be rendered by each class of licensed stations, and to assign frequencies to the various classes of stations, is specifically granted by the provisions of Section 303 of the Federal Communications Act. Accordingly the orders of the Commission issued under this authority have the force and effect of law. Therefore, under existing law, the proposed station at Pottsville cannot be classified as a 'local' station, but is a 'regional' station.

"Moreover, from a practical viewpoint, and as shown by the record, the proposed station may not properly be considered merely a 'local' station. The testimony shows that it is intended to serve, not merely Pottsville, but all of Schuylkill County, with more than 236,000 persons, a large part of Berks and Lebanon Counties, considerable portions of Northumberland, Carbon, and Dauphin Counties, and small parts of several other counties, containing in all a population of approximately 865,000, of which more than 391,000 are in urban centers. Within the 10 millivolt per meter contour of the proposed station there are more than 67,000 persons, while the 2 millivolt contour includes approximately 236,000 and the 0.5 millivolt contour more than 865,000. (R. 50, Exhibit 9.)

"In its opinion herein the Commission treated the application as having to do with a proposed 'local' station, but, as shown, both the frequency to be used and the territory and population to be served are regional, not local."

Your petitioner also called attention to the fact that its case was remanded, not for unrestricted reconsideration, but for reconsideration solely upon the question of Commission policy as to whether the application should be denied, to use the language of this Court, "because a stranger to Pottsville has the controlling financial interest in the applicant corporation."

IV

On June 9, 1938, the Commission, with full knowledge of this Court's instructions but in disregard thereof, entered the following order, as shown by its Minute No. 251-38:

"The Commission (1) denied without prejudice the petition of Pottsville Broadcasting Company for grant of its application for construction permit, Docket No. 4071; (2) granted the petition of Pottsville News and Radio Corporation for oral argument on the application of Pottsville Broadcasting Company, Docket No. 4071, Pottsville News and Radio Corporation, Docket No. 4402, and Schuylkill Broadcasting Company, Docket No. 4176; and (3) directed that thereafter the Commission consider these applications not in a consolidated proceeding, but, individually on a *comparative basis*, the application which in the judgment of the Commission will best serve public interest to be granted." [Italics supplied.]

On June 11, 1938, the Commission addressed letters to the three applicants above mentioned advising them that The Pottsville Broadcasting Company's petition had been denied and that of the Pottsville News and Radio Corporation granted, and stating that September 17, 1938, had been fixed as the date for an oral argument upon all three applications. This date was later changed to September 15, 1938.

On June 17, 1938, the Commission was requested, on behalf of The Pottsville Broadcasting Company, to indicate the scope of the argument to be held upon each of the aforesaid applications. The following questions were specifically asked:

"Is each [application] to be argued upon the entire record therein and the report thereon? Or is argument to be limited to the question as to whether a corporate applicant for a regional frequency should be disqualified from receiving a grant by virtue of the non-residence of its majority stockholder, or by reason of the fact that such stockholder is not personally familiar with the needs of the area to be served?"

Under date of June 25, 1938, the Commission, by its Secretary, replied that "the Commission expects to allow each party full latitude, within the record, in the matter of presenting oral argument upon these dockets."

V

The Commission intends to enter upon an unrestricted reconsideration of the application of your petitioner contemporaneously and on a comparative basis with others subsequently filed, necessarily

bringing in other parties and broadening the issues in the record submitted to this Court. No justification for such procedure is to be found in the decision of this Court, and if the same be countenanced it will make a mockery of the power explicitly vested in this Court to review orders of the Commission.

11

VI

The Commission has announced no policy, such as might be permitted by the decision of this Court, which would disqualify your petitioner from receiving the instrument of authorization for which it has applied. In fact, the Commission has shown that it intends to continue its contrary policy, heretofore announced in numerous decisions of sanctioning the control of applicant corporations by nonresidents who are not personally familiar with the needs of the area to be served. Thus, on May 25, 1938, more than two weeks after this Court rendered its decision herein, the Commission, "In the matter of Arthur Lucas" (Docket No. 4563), granted a permit for a new broadcast station at Savannah, Georgia, to an individual who was not a resident of that community, and who was not shown to be familiar with the needs of the area to be served. The proposed station is to operate on a local frequency.

VII

The failure of the Commission to announce a policy, for uniform application, that the lack of personal familiarity with the needs of the area on the part of a majority stockholder disqualifies a corporation from receiving an instrument of authorization under the Communications Act, the obvious intention to continue its former policy to the contrary, and, in fact, the actual continuance of such contrary policy since the decision of the Court herein, leave the Commission no legal right to deny the application of your petitioner, The Pottsville Broadcasting Company. That Company has been found to be otherwise qualified in all respects, as shown by the decision of the Commission and of this Court, and the public need for the station has also been determined. There is nothing further which the Commission may lawfully do prior to granting petitioner's application.

VIII

Your petitioner alleges that the Commission has refused and still refuses to proceed in accordance with the decision of this Court reversing the Commission upon the primary question of your
12 petitioner's financial ability and remanding the cause for reconsideration upon the secondary and sole remaining question of Commission policy as to whether the application should be denied because the controlling financial interest in the applicant corporation is held by a nonresident of Pottsville.

IX

Your petitioner alleges that the Commission has refused and still refuses either to grant or deny petitioner's application upon the facts contained in the record submitted to this Court and upon which the decision of this Court was based.

X

Your petitioner alleges that the Commission has disregarded and intends to continue to disregard the facts of record and to base its decision upon facts embodied in the records before it on other applications assigned for argument on the same day and to be considered on a comparative basis, and also to disregard the law of this case as adjudicated by this Court, and is attempting to evade the jurisdiction of this Court.

XI

Your petitioner alleges that the Commission has indicated its intention to proceed, and will so proceed before this Court convenes in October, in a manner contrary to the decision of this Court and entirely without the Commission's jurisdiction under that decision.

XII

In support of its petition, your petitioner refers to the printed record in this case and to copies thereof on file in this Court, and prays that this Court refer to the same and to the decision herein.

XIII

Your petitioner alleges that the prosecution of its application before the Federal Communications Commission and the necessity for prosecuting an appeal to this Honorable Court have already entailed a considerable expenditure of time and money, and if now the Commission shall be permitted to evade the mandate of this Court and indulge in dilatory tactics, such as it has plainly manifested its intention of doing by assigning this case for unrestricted reconsideration on a comparative basis with other subsequently filed applications, petitioner will suffer irreparable injury thereby.

XIV

Your petitioner avers that the aforesaid order of the Commission and its threatened action thereunder are in violation of the Federal Communications Act and in excess of the Commission's jurisdiction thereunder, and also in violation of the legal rights of petitioner under the decision of this Court. Petitioner has no adequate remedy whatsoever except by writs of prohibition and mandamus.

Wherefore, the premises considered, your petitioner prays:

1. For a writ of prohibition to be issued from this Honorable Court directed to the Federal Communications Commission and the

members thereof, prohibiting them (a) from hearing argument or reargument in this case except on the one question of policy as to which the case was remanded for reconsideration by the Commission; (b) from considering the application of petitioner on a comparative basis with other applications subsequently filed and which constitute no part of the record considered by this court; (c) from hearing argument upon or deciding the application of the Pottsville News and Radio Corporation or that of the Schuylkill Broadcasting Company until such time as the Commission shall have complied with the judgment of this Court; and (d) from taking any other procedural steps or from exercising jurisdiction herein other than as contemplated in the judgment of this Court reversing the Commission;

2. For a rule directed to the Federal Communications Commission and the members thereof to show cause why the writ of prohibition as herein prayed shall not issue;

3. For a writ of mandamus to be issued from this Honorable Court directed to the Federal Communications Commission and the members thereof commanding them (a) to render a decision in this case within a time certain, to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court; (b) to base the decision on the one question of policy as to which the case was remanded for reconsideration by the Commission; and (c) to grant the application of your petitioner on this record, as submitted to and considered by this Court;

4. For a rule directed to the Federal Communications Commission and the members thereof to show cause why the writ of mandamus as herein prayed shall not issue; and

5. For such other and further relief as may be appropriate in the premises.

Respectfully submitted.

THE POTTSVILLE BROADCASTING COMPANY,
By ELIOT C. LOVETT,
CHARLES D. DRAYTON,

Attorneys for Petitioner.

[Duly sworn to by Charles D. Drayton; jurat omitted in printing.]

15 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Opposition of Federal Communications Commission to the petition of the Pottsville Broadcasting Company for a rule to show cause why a writ of prohibition and a writ of mandamus shall not issue

(Filed July 12, 1938)

Now comes the Federal Communications Commission by its counsel and, while expressly reserving and saving to itself the right to make full and complete return or otherwise plead to said rule should it

issue, opposes the issuance of a rule against the Federal Communications Commission to show cause why a writ of prohibition and a writ of mandamus should not issue in the above-entitled matter and, as grounds for such opposition, respectfully shows the Court:

1. That prohibition or mandamus may not be invoked against the Commission if the Commission acts in conformity with the mandate of this Court;

2. That the Commission is acting within the mandate of this Court;

3. That prohibition or mandamus may not be invoked against the Commission to restrain it from exercising regulatory power conferred by law or to circumscribe its discretion;

4. That the petitioner has a plain, speedy, and adequate remedy at law;

5. That petitioner's application has not been denied, and it cannot be assumed that said application will be denied.

16 Wherefore, the Federal Communications Commission prays that this Court deny the Pottsville Broadcasting Company a Rule to Show Cause in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
By HAMPSON GARY,

General Counsel.

WM. H. BAUER,

Acting Assistant General Counsel.

ANDREW G. HALEY,

Assistant Counsel.

17 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Opposition of Schuylkill Broadcasting Company to the petition of the Pottsville Broadcasting Company for the issuance of writs of Prohibition and Mandamus to the Federal Communications Commission

Filed July 25, 1938

Now comes Schuylkill Broadcasting Company, intervener in the proceedings before this Court on the appeal in this cause (No. 7016), entitled the Pottsville Broadcasting Company, appellant v. Federal Communications Commission; Schuylkill Broadcasting Company, intervener, and opposes the issuance of writs of prohibition and mandamus to the Federal Communications Commission in the above-entitled matter and, as grounds for such opposition, respectfully shows the Court the following:

The petitioner in the above-entitled matter, The Pottsville Broadcasting Company, prays for, among other things, a writ of prohibi-

bition to be directed to the Federal Communications Commission, prohibiting them from considering the application of petitioner on a comparative basis with the application of the Schuylkill Broadcasting Company and for a writ of mandamus commanding the Commission to grant the application of petitioner upon an independent reconsideration of its application without considering the application of the Schuylkill Broadcasting Company.

A chronological review of the proceedings surrounding the prosecution of the two applications clearly shows that they are not only contemporaneous and mutually exclusive, but that they should be considered on a comparative basis on the merits in order to determine which would better serve the public interest, convenience, and necessity.

18 On August 12, 1936, the Commission issued its Notice of hearing, dated August 12, 1936, designating the application of the Pottsville Broadcasting Company (Commission Docket No. 4071) for hearing to be held on September 30, 1936.

Prior to the issuance of the Commission's Notice of Hearing on the Pottsville Broadcasting Company application, and on August 10, 1936, the Schuylkill Broadcasting Company filed its application (File No. B2-P-1298; Commission Docket No. 4176) for a new broadcasting station to be located at Pottsville, Pennsylvania, on the frequency 580 kilocycles, the same assignment, requested by the Pottsville Broadcasting Company.

On August 31, 1936, the Schuylkill Broadcasting Company, pursuant to Rule 105.20 of the Commission's Rules and Regulations, filed with the Commission a petition to intervene in the proceedings to be had on the application of the Pottsville Broadcasting Company, alleging that it had a substantial interest in the subject matter of the hearing in that the two applications are in direct conflict and the granting of the one would preclude the granting of the other. On September 8, 1936, the Commission, Broadcast Division, granted said petition to intervene and be made a party to the hearing on the application of the Pottsville Broadcasting Company, thus recognizing that said petition disclosed a substantial interest in the subject matter of the hearing within the meaning of and as required by Rule 105.20 of the Rules and Regulations.

Approximately one month prior to the hearing on the application of the Pottsville Broadcasting Company, and on September 3, 1936, Counsel for Schuylkill Broadcasting Company addressed the following communication to the Commission, requesting that the Commission designate the application of the Schuylkill Broadcasting Company for hearing on the same date previously designated for the application of the Pottsville Broadcasting Company, namely, September 30, 1936:

"SEPTEMBER 3, 1936."

"FEDERAL COMMUNICATIONS COMMISSION,
 "Washington, D. C.

"In re: Application of Schuylkill Broadcasting Company, File No.
 B2-P-1298

"GENTLEMEN: The Schuylkill Broadcasting Company hereby respectfully requests that its application for authority to construct a new broadcast station at Pottsville, Pennsylvania, to operate on 580 kilocycles, with 250 watts power, during daytime hours, filed with the Commission on August 10, 1936, and bearing file number B2-P-1298, be designated for hearing on September 30, 1936.

"There is now pending before the Commission an application of the Pottsville Broadcasting Company for a new station at Pottsville, Pennsylvania, involving the identical assignment, which has been designated for hearing on September 30, 1936 (File No. B2-P-1154; Docket No. 4071). Notice of the hearing upon this application was sent to all parties on August 12, 1936.

"These applications are in direct conflict and the granting of one would preclude the granting of the other. Therefore, on August 31, 1936, the Schuylkill Broadcasting Company filed with the Commission a petition to intervene in the proceedings to be had in the matter of the application of the Pottsville Broadcasting Company.

"Since the two applications are for the same frequency assignment; the issues in each are substantially identical; and the same parties are involved in both; it is believed that considerable time and expense will be conserved by holding hearings on both applications on the same date. Furthermore, the interests of none of the parties involved would be adversely affected in the event the Commission designates both applications to be heard upon the same date.

"It is therefore requested that the Commission designate the application of the Schuylkill Broadcasting Company for hearing on the same date heretofore fixed for the application of the Pottsville Broadcasting Company, namely September 30, 1936.

20 "The undersigned has consulted Mr. Elliott Lovett, counsel for the Pottsville Broadcasting Company, and he has stated that he has no objection to both applications being heard on the same date.

"LOUCKS & SCHARFELD,
 "Attorneys for the Schuylkill Broadcasting Company,
 "By PHILIP G. LOUCKS."

Despite the request of the Schuylkill Broadcasting Company to have its application heard on the same date as that fixed for the Pottsville Broadcasting Company, the application was not designated for hearing with that of the Pottsville Broadcasting Company.

The application of the Pottsville Broadcasting Company was heard on September 30, 1936, and the Schuylkill Broadcasting Company,

having been permitted to intervene in said matter by the Commission, participated in the hearing. On November 5, 1936, the Commission released Examiner's Report No. I-305 on the application of the Pottsville Broadcasting Company.

On November 20, 1936, the Schuylkill Broadcasting Company filed its exceptions to the Examiner's Report on the Pottsville Broadcasting Company's application. In said exceptions, exception was particularly taken to the Examiner's denial of the motion of the Schuylkill Broadcasting Company, made during the hearing, for postponement of decision on the Pottsville Broadcasting Company application until such time as the application of the Schuylkill Broadcasting Company could be heard by the Commission and exception was also taken to the Examiner's failure to report the fact that such motion was made and denied during the hearing.

On May 4, 1937, the Commission entered its final order denying the application of the Pottsville Broadcasting Company, effective June 29, 1937, later extended to July 6, 1937.

21 Prior to the time that the Commission entered its final order denying said Pottsville Broadcasting Company application, and on April 12, 1937, a hearing was had on the application of the Schuylkill Broadcasting Company application, and the Commission made the Pottsville Broadcasting Company a party respondent to the proceedings.

On June 24, 1937, the Commission released Examiner's Report No. I-442, recommending that the application of the Schuylkill Broadcasting Company be granted.

On July 8, 1937, the Schuylkill Broadcasting Company requested oral argument in support of Examiner's Report I-442 and in opposition to the exceptions thereto. On July 9, 1937, the Pottsville Broadcasting also requested oral argument in connection with said Examiner's Report No. I-442.

On August 18, 1937, the Commission granted oral argument on Examiner's Report I-442; said oral Argument to be heard on November 4, 1937.

On July 26, 1937, the Pottsville Broadcasting Company sued out its appeal (No. 7016) in this Court from the Commission's decision, rendered July 6, 1937, denying its application.

On August 24, 1937, the Schuylkill Broadcasting Company filed its notice of intention to intervene and a verified statement of intervenor's interest in the proceedings to be had before this Court, stating that the Schuylkill Broadcasting Company is a Pennsylvania corporation organized for the purpose of establishing and operating a broadcasting station and has its principal place of business at Pottsville, Pennsylvania; that it has pending before the Commission an application to establish a new radio broadcasting station at Pottsville, on the frequency 580 kilocycles, with 250 watts power, daytime hours of operation, which is the identical assignment sought by appellant, Pottsville Broadcasting Company; that the applica-

22 tion of the Schuylkill Broadcasting Company was pending at the time of the hearing upon appellant's application and by formal action of the Commission, the Schuylkill Broadcasting Company was permitted to participate and did participate in the hearing upon appellant's application; that subsequently, on April 12, 1937, a hearing was had upon the application of Schuylkill Broadcasting Company and thereafter on June 24, 1937, the Commission released the report of its Examiner, which report recommended that the application of the Schuylkill Broadcasting Company be granted; that the appellant, Pottsville Broadcasting Company, in its "Notice of Appeal" and "Statement of Reasons Therefor," prayed that the decision of the Commission denying its application be reversed with instructions that the application of the Pottsville Broadcasting Company be granted; and that the reversal of said decision as requested would preclude favorable action upon the application of the intervenor, Schuylkill Broadcasting Company, and require denial of said application (R. 5).

The Schuylkill Broadcasting Company participated in said proceedings before this Court by filing its "Brief and Argument."

Subsequent to the taking of the aforesaid appeal by the Pottsville Broadcasting Company, the Commission continued oral argument on Examiner's Report No. I-442 on the application of the Schuylkill Broadcasting Company, scheduled for November 4, 1937, until further notice, pending decision by this Court of the Pottsville Broadcasting Company appeal.

On May 9, 1938, this Court rendered its decision in the aforesaid appeal (No. 7016), reversing and remanding the case.

On May 23, 1938, the Pottsville Broadcasting Company filed with the Commission a petition for a grant of its application, and on June 7, 1938, the Schuylkill Broadcasting Company filed its opposition to the Pottsville Broadcasting Company's petition and requested that the two applications be considered on a comparative basis
23 on the merits to determine which applicant would better serve the public interest.

On June 9, 1938, the Commission, as shown in its Minute No. 251-38, stated that it would consider these applications individually, but on a comparative basis and that the application would be granted which in the judgment of the Commission will best serve public interest. The applications have now been scheduled for oral argument on September 15, 1938.

It is apparent from the foregoing that the Schuylkill Broadcasting Company prosecuted its application with due diligence at all stages of the proceedings; that, prior to the time that the Pottsville Broadcasting Company application was originally heard, it requested that its application be designated for hearing on the same date scheduled for the application of the Pottsville Broadcasting Company (see supra P. 3-4); that, by formal action of the Commission, it was permitted to participate and did participate in the proceedings on the application of the Pottsville Broadcasting Company and that, by ac-

tion of the Commission, the Pottsville Broadcasting Company was made a party to the proceeding on the Schuylkill Broadcasting Company application; and that the Schuylkill Broadcasting Company objected to prior consideration of the application of Pottsville Broadcasting Company.

Under these circumstances, the Commission was required and is now required to consider the two applications on a comparative basis on the merits in order to determine which would better serve the public interest.

The Commission's failure to hear the two applications together and to withhold decision upon the application of the Pottsville Broadcasting Company until such time as it could have considered the two applications on a comparative basis (as it was requested to do) and the fact that the Commission rendered its decision on the application

of the Pottsville Broadcasting Company prior to its consideration of the application of the Schuylkill Broadcasting Company, although resulting in the Pottsville Broadcasting Company's appeal and culminating in this Court's decision, neither preclude the Commission from now considering the two applications on a comparative basis nor operate to support the petitioner's position that its application be granted upon an independent reconsideration without considering the application of the Schuylkill Broadcasting Company.

On the other hand, if, as the petitioner, Pottsville Broadcasting Company, urges in its petition, the Commission is now prohibited from considering the application of the petitioner on a comparative basis with the application of the Schuylkill Broadcasting Company and is commanded to grant the application of the Pottsville Broadcasting Company without a comparative consideration of the Schuylkill Broadcasting Company's application on the merits in order to determine which would better serve the public interest, the Schuylkill Broadcasting Company will not only be a "person aggrieved" within the meaning of this Court's opinion in *Pittsburgh Radio Supply House, et al., v. Federal Communications Commission* (— App. D. C. —, decided May 23, 1938), but will be deprived of a full and fair hearing as provided by Sections 309 (a) and 409 (a) of the Communications Act of 1934, and denied due process of law.

An independent reconsideration and grant of the Pottsville Broadcasting Company application without considering the application of the Schuylkill Broadcasting Company application on the merits in conjunction therewith will obviously result in prejudice to the Schuylkill Broadcasting Company and render it a "person aggrieved" since the granting of the Pottsville Broadcasting Company's application will preclude the granting of the Schuylkill application. In *Pittsburgh Radio Supply House, et al., v. Federal Communications*

Commission, *supra*, where a request had been made that two applications be considered together, this Court said:

"* * * we find that Head of the Lakes, though a party to the hearing before the Commission, at no time applied to have its

application given prior consideration or objected to prior consideration of Waterbury's application; and this leaves us with only the objection in that respect made by Pittsburgh.

"As to it, the record shows that it requested that Waterbury's application and its application for increased power be considered together. This request was in line with the Commission's Rule 106.4. If Pittsburgh's application had been for a lawful grant, and if it were shown that the Commission's prior consideration of Waterbury's application seriously prejudiced Pittsburgh, we would have a case in which we might say Pittsburgh had appealable interest as a 'person aggrieved,' notwithstanding the latitude which we have said should be permitted to the Commission in such matters. *Pulitzer Publishing Co. v. Fed. Comm. Comm.*, 94 F. (2d) 249, 252. * * *

It is to be noted, furthermore, that the application of the Schuylkill Broadcasting Company, although filed with the Commission prior to the hearing on the application of the Pottsville Broadcasting Company and heard by an Examiner prior to the Commission's decision on the Pottsville Broadcasting Company application, has not as yet been orally argued before the Commission nor has the Commission considered the Examiner's Report on and the record evidence in connection with said application.

Sections 309 (a) and 409 (a) of the Communications Act of 1934 contemplate and provide for a full and fair hearing on applications. With respect to oral arguments before the Commission, Section 409 (a) of the Communications Act provides that "In all cases heard by an examiner, the Commission shall hear oral argument on the request of either party." This provision is mandatory so that any party to a proceeding is entitled as a matter of right to present oral argument. Such oral argument before the Commission and
26 consideration of the Examiner's Report and record evidence by the Commission constitutes a vital part of a full and fair hearing.

The Schuylkill Broadcasting Company has requested oral argument upon its application. The Commission has set the application of the Pottsville Broadcasting Company and the application of the Schuylkill Broadcasting Company for oral argument on September 15, 1938, so that it can consider the applications on a comparative basis. If the Commission is now prohibited from considering said conflicting applications on a comparative basis on the merits and is commanded to grant the petitioner's application upon an independent reconsideration, as requested by the petitioner, the Schuylkill Broadcasting Company will be deprived of a full and fair hearing on its application. Such hearing as has been had upon the Schuylkill application would be nullified and any further proceeding on said application would be a futility.

Wherefore, the premises considered, the Schuylkill Broadcasting Company, respectfully prays that this Court deny the Pottsville

Broadcasting Company a Rule to Show Cause in this proceeding and dismiss its Petition for Writ of Prohibition and for Writ of Mandamus.

Respectfully submitted.

SCHUYLKILL BROADCASTING COMPANY.

By PHILIP G. LOUCKS,
ARTHUR W. SCHARFELD,
JOSEPH F. ZIAB,
Its Attorneys.

27

ACKNOWLEDGMENT OF SERVICE

Receipt of a true copy of the foregoing "Opposition of Schuylkill Broadcasting Company to the Petition of the Pottsville Broadcasting Company for the Issuance of Writs of Prohibition and Mandamus to the Federal Communications Commission" is acknowledged this 25 day of July 1938.

ELIOT C. LOVETT, per M. S.

Attorney for Petitioner,

The Pottsville Broadcasting Company.

JOHN B. REYNOLDS,

Federal Communications Commission, Respondent.

Assistant Secretary.

27-a In United States Court of Appeals for the District of
Columbia

[Title omitted.]

[File endorsement omitted.]

*Reply to opposition of Schuylkill Broadcasting Company to petition
for writs of prohibition and mandamus*

Filed July 26, 1938

The Schuylkill Broadcasting Company, intervener in the original proceedings before this Court on the appeal of The Pottsville Broadcasting Company, petitioner in this proceeding, opposes the issuance of writs of prohibition and mandamus as prayed for the reasons that (a) it, allegedly, prosecuted its application with diligence because it requested, though unsuccessfully, that its application be heard with that of The Pottsville Broadcasting Company and was later permitted to and did participate in the hearing upon the latter and objected to prior consideration thereof, (b) it will be a "person aggrieved" within the meaning of this Court's opinion in the Pittsburgh Radio Supply House case, and (c) it will be deprived of a full and fair hearing as provided by the Act and thereby denied due process of law.

Counsel for the Schuylkill Broadcasting Company contend that they have a "right" to have their application heard with that of The Pottsville Broadcasting Company and to have the Commission decide them on a comparative basis—a procedure which the Commission now proposes to follow unless prohibited by this Court. If this contention were sound it would open wide the doors for the admission of endless procedural difficulties which would be a needless burden upon the Commission and upon applicants, and would act as a threat to discourage the development of radio broadcasting through the medium of meritorious applications.

The Schuylkill Broadcasting Company bases its alleged "right" to have its application considered in connection with that of The Pottsville Broadcasting Company upon the mere fact that it filed in time to intervene in the proceedings upon the latter application. Any mention of the fact that the latter application was filed on May 19, 1936, and designated for hearing on July 2, 1936, more than six weeks later, is studiously avoided. This is doubtlessly due to the fact that these dates, together with the filing date—August 10, 1936—of the Schuylkill application, show that the only reason it was not heard at the same time as that of The Pottsville Broadcasting Company was due entirely to the laches of the Schuylkill Broadcasting Company, and that it alone is responsible for the situation in which it now finds itself.

The third application, that of the Pottsville News and Radio Corporation, for the same facilities at Pottsville was not filed until December 7, 1936, nearly four months after the filing of the Schuylkill application and more than five months after The Pottsville Broadcasting Company's application was designated for hearing. However, due to, or aided by, a postponement requested by Schuylkill, both of those late applications were heard at the same time. Obviously, therefore, consistent with the contention now so urgently made, any consideration which the Commission now gives to the application of the Schuylkill Broadcasting Company must at the same time be given to that of the Pottsville News and Radio Corporation. If there had been a fourth application filed for the same facilities, but only in time for the applicant to participate, by intervention, in the hearing upon the application immediately preceding, the last applicant would have just as much "right" to demand contemporaneous consideration of its application with the three which had preceded as has now the Schuylkill Broadcasting Company to make its demand. There would be no end. Each successive applicant would, so to speak, be "riding on the coat-tails" of its predecessor, and this might continue until the first applicant was exhausted by the delay, by the expense, or by both.

Happily, the Commission is bound by no rules which contemplate any such procedure. Rule No. 100.4 provides, in general, for the consideration of conflicting applications at the same time. However, this is done only "so far as practicable," and the Rule excepts "applications filed after any such application has been designated for hearing." The rule, in full, follows:

"In fixing dates for hearings the Commission will, *so far as practicable*, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, *excepting, however, applications filed after any such application has been designated for hearing.*" [Italics supplied.]

Needless to say, this rule has the force and effect of law. The Commission apparently recognized that fact when it disregarded the Schuylkill request to hear its application with that of The Pottsville Broadcasting Company. The latter was designated for hearing more than five weeks before the former was filed, and it was actually filed more than six weeks before it was designated. The Rule specifically excepts from its operation applications filed at any time after the application in question has been designated for hearing. As we stated in our reply to the Commission's "Opposition" to our petition, such an exception is clearly in the interest of orderly procedure, and if it were not so provided the Commission might become involved with an endless procession of applications, each one of which would delay consideration of that which preceded it.

Counsel for the Schuylkill Broadcasting Company cite the decision of this Court in *Pittsburgh Radio Supply House v. Federal Communications Commission* (decided May 23, 1938) in support of their contention. The only similarity lies in the fact that the aforementioned Rule 106.4 was involved. There were three appeals, and all were dismissed because of the lack of an appealable interest. Each was from a decision granting the application of WATR, Waterbury, Connecticut, which application was filed after those filed by two of the appellants—Pittsburgh Radio Supply House and Head of the Lakes Broadcasting Company. However, those two applications were for nighttime power increases in violation of the Commission's rules. The third appellant—Intermountain Broadcasting Corporation—had no application pending, and its aggrievement was wholly problematical. That part of the Court's decision upon which counsel for Schuylkill rely reads:

"As to it [Pittsburgh Radio Supply House], the record shows that it requested that Waterbury's application and its application for increased power be considered together. *This request was in line with the Commission's Rule 106.4.* If Pittsburgh's application had been for a lawful grant, and if it were shown that the Commission's prior consideration of Waterbury's application seriously prejudiced Pittsburgh, we would have a case in which we might say Pittsburgh had appealable interest as a 'person aggrieved,' notwithstanding the latitude which we have said should be permitted to the Commission in such matters * * * " [Italics supplied.]

The inapplicability of this reasoning to the Pottsville case is readily apparent. Pittsburgh's application was filed prior to that of Waterbury, not merely prior to the designation of the latter for hearing,

and hence came well within Rule 106.4. But it was not for a lawful grant. Here the Schuylkill application was filed not only twelve weeks after that of The Pottsville Broadcasting Company but also more than five weeks after the latter was designated for hearing. It was thus excepted from the operation of the Rule. Therefore, the Commission properly refused to heed the Schuylkill request that its application be heard with that of The Pottsville Broadcasting Company. To contend that this Court, in the Pittsburgh case, adopted a ruling requiring a contrary procedure is to contend for the invalidity of the very Rule (106.4) which has been recognized as proper.

Enough has been said to show that the alleged "diligence" of the Schuylkill Broadcasting Company cannot properly be made the basis for any contention under the rules of the Commission or under the decisions of this Court.

Counsel contend that the Schuylkill Broadcasting Company will be a "person aggrieved" if the application of The Pottsville Broadcasting Company be considered and granted without a comparative consideration of its application. But it fails to state that it will also be a "person aggrieved" if The Pottsville Broadcasting Company's application be granted on a comparative basis. They both cannot be granted. Therefore, one must be denied. Schuylkill counsel apparently fear that their application might be that one. But they filed their application with full knowledge that they could not, under the Commission's rules, be heard at the same time as The Pottsville Broadcasting Company, and that the application of the latter might be granted by the time theirs was ready for final action. They chose to take a chance; they should now abide the result.

The contention is also made that the Schuylkill Broadcasting Company will be deprived of a full and fair hearing and thereby denied due process of law if the application of The Pottsville Broadcasting Company be considered and granted without a comparative consideration of the Schuylkill application. This contention is predicated upon the assumption that oral argument before the Commission "constitutes a vital part of a full and fair hearing" and that such argument would be a "futility" if The Pottsville Broadcasting Company application were granted prior thereto. Would that be illegal? Is not any oral argument a "futility" that results in the denial of the application? Is it any the less a "full and fair hearing"? Or is it only "full and fair" when the "right" application is granted? Do not the Commission's own rules, which have the force and effect of law, mean anything, especially when coupled with the rule of reasonableness?

The Schuylkill Broadcasting Company insists upon its "right" to a comparative consideration but loses sight of the fact that such alleged "right" is based upon full compliance with the Commission's rules. It had a perfect "right" to file its application shortly after The Pottsville Broadcasting Company filed, and before the latter was designated for hearing more than six weeks later. Instead, it slept upon that "right." The Commission then permitted it to participate

in the hearing upon the application of The Pottsville Broadcasting Company and afforded it the opportunity to cross-examine the latter's witnesses and to introduce evidence. Thus it was given the right to have included in the record any facts which might show that the public interest would not be served by the grant of the application. But it failed to make any such showing. And when it appeared in this Court, through its brief in connection with petitioner's appeal, it did not even intimate that the Commission had no right to decide the case on the record as made and as presented, in substance, to this court, or that it (Schuylkill) had a "right" to comparative consideration with petitioner. Only when it is faced with the prospect of adversity does it claim a right—a right of which it failed to take advantage when the opportunity was presented.

If any party now has any right in this case, it is The Pottsville Broadcasting Company, and its right is to require adherence to the rules and the established and uniform practice of the Commission, and to insist upon respect for the decision of this Court.

The "Opposition" of the Schuylkill Broadcasting Company only serves to emphasize the need for the relief for which The Pottsville Broadcasting Company prays in its petition for writs of prohibition and mandamus.

Respectfully submitted.

ELIOT C. LOVETT,

729 Fifteenth Street, Washington, D. C.

CHARLES D. DRAYTON,

1001 Fifteenth Street, Washington, D. C.

Attorneys for Petitioner.

JULY 26, 1938.

Receipt of a copy of the foregoing "Reply to Opposition of Schuylkill Broadcasting Company to Petition for Writs of Prohibition and Mandamus" acknowledged this 26th day of July 1938.

(Sgd.) HAMPSON GARY,

Attorney for Respondent,

Federal Communications Commission.

(Sgd.) PHILIP G. LOUCKA,

Attorney for Schuylkill Broadcasting Company,

Intervener in the original proceeding.

[Clerk's certificate to foregoing paper omitted in printing.]

28 In United States Court of Appeals for District of Columbia

[Title omitted.]

Minute entry

January 10, 1939

The argument in the above entitled cause on the petition for writ of mandamus and prohibition was commenced by Mr. Eliot C. Lovett, attorney for petitioner (Appellant), continued by Mr. Wm. H. Bauer,

attorney for respondent, and concluded by Mr. Charles D. Drayton, attorney for petitioner.

Petitioner allowed to file comments on points and authorities filed by the Federal Communications Commission.

29 In United States Court of Appeals for the District of Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING
COMPANY, INTERVENER, APPELLEES

On Petition for Writ of Prohibition and Writ of Mandamus

(Argued January 10, 1939. Decided April 3, 1939)

Eliot C. Lovett and Charles D. Drayton, both of Washington, D. C.,
for appellant.

William J. Dempsey, General Counsel, William H. Bauer, Andrew
G. Haley, Hampson Gary, General Counsel, George B. Porter, Assistant
General Counsel, Fanney Neyman, Assistant Counsel, and Frank
U. Fletcher, all of Washington, D. C., for Federal Communications
Commission; and Arthur W. Scharfeld, Philip G. Loucks, and Joseph
F. Zias, all of Washington, D. C., for Schuylkill Broadcasting Com-
pany.

Before GRONER, C. J., and STEPHENS and EDGERTON, JJ.

Opinion

GRONER, C. J.: Pottsville Broadcasting Company (petitioner) is
a Maryland corporation. In May 1936 it applied to the Federal Com-
munications Commission for a construction permit to erect a radio
broadcasting station in Pottsville, Pennsylvania. The application was
on the prescribed form and averred that there was public need for the
service and that it would not cause objectionable interference with any
existing station; that the station would be built and equipped in con-
formity with the Commission's standards and subject to its approval;
that the applicant was legally, technically, and financially qualified;
and that the public interest, convenience and necessity would be served
by the grant to it of the permit. On July 2, 1936, the application was
referred to an examiner; hearings were begun in September; and in
October the examiner reported his findings of fact, concluded that the
averments of the application had been proved, and recommended the
granting of the application. The Commission allowed intervention
and exceptions by the Schuylkill Broadcasting Company, which had
applied for the same facilities shortly after petitioner's application

has been set for hearing, but whose record had not been made. In December 1936 the Broadcast Division of the Commission set petitioner's application down for oral argument. In May 1937 the Commission handed down its decision, denying petitioner's application.

30 In its statement of facts and decision the Commission said there existed a need for local service in Pottsville; that the equipment proposed to be used was capable of operating in conformity with the technical rules and regulations of the Commission; but that the showing of financial ability was not satisfactory; and for that reason it was not in the public interest to grant the license. The Commission added that the principal stockholder of the applicant did not reside in Pottsville, had no definite plans for spending a "percentage of his time" there, and had failed to show he was acquainted with the needs of the area proposed to be served and prepared to meet those needs.

From the order denying the application there was an appeal to this court. In May 1938 we decided that the Commission was in error in holding that petitioner had not shown adequate financial responsibility, and on this ground reversed the order. 98 F. 2d 288. As to the Commission's general inference, i. e., that it is desirable that those who control the policies of a local station should show themselves acquainted with the needs of the locality, we said that we knew from published reports of the Commission that it had not adopted a fixed and definite policy in that respect, nor sought to lay down a hard and fast rule; and in this view, and considering the good faith of the applicant and the conclusion of the Commission that the establishment of a station in Pottsville was desirable and in the public interest, we would without expressing any opinion of our own leave that question for reconsideration by the Commission.

When the case was remanded, petitioner asked the Commission to reconsider and grant its application. It pointed out that the Commission had never adopted a policy requiring a majority stockholder in the applicant corporation for a local station to be a resident of the area to be served. And it insisted that, since the application was not for a "local station" anyway, the question was not pertinent, and there was consequently nothing more to consider. The Commission, however, refused to accede to this position and entered an order for a new hearing on the applications of petitioner, Pottsville News and Radio Corporation (whose application had been filed seven months after the petitioner's), and Schuylkill Broadcasting Company. The Commission announced that it would hear and consider the applications "individually on a comparative basis, the application which in the judgment of the Commission will best serve public interest to be granted."

To prevent the carrying out of this order, petitioner applied to this court for a writ to prohibit the Commission from taking any steps or exercising any jurisdiction except as required by the judgment of this court and for a writ of mandamus to require the Commission to grant the application of the petitioner on the record as submitted to

and considered by this court. The Commission answered and insists that neither prohibition nor mandamus may be invoked to restrain it from exercising at any time its regulatory power conferred by law, or to circumscribe its discretion.

Stated in abridged form, the positions of the parties are these:

Petitioner insists that the order of the Commission indicates a definite intention to disregard the decision and mandate of this court, to consider petitioner's application *de novo*, and to compel
 81 petitioner to contest its rights with new parties who were not parties to the original hearing and were never eligible to become parties under the Commission's rule,³ and in consequence to base its new decision upon facts not properly before it.

The position of the Commission is that the order of this court was not final; that this court merely reversed the former order of the Commission and remanded the cause to it for further proceedings; and that in this aspect it is within its discretion to combine petitioner's application and other subsequently filed applications, thus placing all on a parity and reaching a conclusion on a comparative basis.

In view of what has been said, it will be obvious at once that the question we have to decide is: When this court reverses a decision of the Commission and remands the case for further proceedings, is the Commission required to reconsider the same record in the light of our opinion, or may it reopen the cause and hear it on an entirely new and different record? The Commission takes the latter view and insists that the statute, by conferring broad regulatory power and discretion in the granting of licenses, imposes upon it the power and the duty, upon remand, to reconsider the application in the light of events subsequent to the making of the original record. Stated in terms of this particular case, the question is whether the Commission, having decided that the petitioner was qualified in particular respects, may now disregard petitioner's priority and the case made by it and consider its application on a comparative basis with subsequent applications on records made after the Commission's original decision.

Sec. 402 of the Act (47 U. S. C. A. 402) applies to appeals from decisions of the Commission, and Sec. 402 (e) provides:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court * * *. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari * * *."

³ Rule 106.4. "In fixing dates for hearings the Commission will, so far as practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant, or arise out of the same complaint or cause; and for hearings on all applications which by reason of the privileges, terms, or conditions requested present conflicting claims of the same nature, excepting, however, applications filed after any such application has been designated for hearing." This has become Sec. 12.21 of the Commission's Rules of Practice and Procedure, effective January 1, 1939.

We have no doubt that as far as is practicable the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding. The rule in such cases is stated in *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, restated in *Re Potts*, 166 U. S. 263, and confirmed in *D. L. & W. R. Co. v. Rellstab*, 276 U. S. 1. Shortly

32 stated, the rule is that when a case has been decided on appeal and remanded to the trial court, the latter has no authority, without leave of the appellate court "to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer". *Re Potts*, supra, at p. 267.

"The circuit court" is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded * * *.

But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only * * *. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." 160 U. S. 255-256.

Applying the rule to the case here, we have a situation in which it is apparent that the applicant for a radio license duly certified itself under the rules of the Commission as in all respects qualified to receive and exercise the permit. The examiner, to whom the application was referred, found all the material facts necessary to the grant in favor of the applicant. The Commission, on the report and exceptions filed by an applicant who had subsequently filed for the same facilities and who was permitted to intervene in opposition, affirmatively found that there was need of the station and that the equipment proposed to be used was in conformity with its rules and regulations; but held that the application should be rejected because "in the present state of the record, the applicant corporation does not appear to be financially qualified to construct the proposed station"; and as a sort of supplemental justification of the rejection, stated that the president of the applicant corporation had never resided in Pottsville and had no present purpose of residing there, but failed to find that fact an adequate ground for rejection. On appeal to this court we held that the Commission was in error in holding there was lack of financial qualification. Since we were uncertain whether the Commission intended its statement "that those who will control the policies of proposed new 'local' broadcast stations should show themselves to

* The Supreme Court was speaking in 1895, and this passage refers to the old federal circuit court, since abolished, and not to the circuit court of appeals.

be acquainted with the needs of the area proposed to be served and to be prepared to meet that need" to be a finding of lack of public interest, we remanded the case, with the comment that this ground of refusal never had been brought to our attention and that we were not advised whether it was the purpose of the Commission to adopt it as a rule or policy, but that if such action were taken, it should cer-

tainly be applied with uniformity and that, since there was
33 neither prior rule nor practice on which we could rely, we assumed the statement was secondary rather than primary.

And accordingly we said that if the Commission should be of opinion that the application ought not to be granted because a stranger to Pottsville had the controlling financial interest and should adopt a rule with relation to that subject, we should feel impelled to accept the Commission's view. The case, with that question alone open, was remanded to the Commission for reconsideration.

In its opposition the Commission now says there are other questions which must be determined before it can find that the public interest will be served in granting petitioner's application. The only such matter pointed out is that the Commission had made no previous finding "as to the technical qualifications of the petitioner to operate the station, the Commission's duty under Section 303(q) of the Act to provide protection to air navigation was not discharged," but we find by reference to the Commission's findings that "the equipment proposed to be used by applicant is capable of operating in conformity with the technical Rules and Regulations of the Commission." This, we think, is a finding in favor of technical qualification, and we know of nothing either in the practice or rules of the Commission which requires more. The method of installation, which the Commission is required under Sec. 303(q) of the Act to regulate so as to avoid a menace to air navigation, has relation to the transmitter location, but it is hardly ingenuous to say that this is a matter as to which the Commission ordinarily makes any finding prior to the grant of a construction permit. On the contrary, it is the custom of the Commission to reserve that question and to make the grant subject to its approval of the location and the antenna system. And this would certainly seem all that is necessary to protect the public interest. The custom was recognized by petitioner in this case, and its original application was made subject to the Commission's subsequent approval of the site. In view of this, it seems to us to be going too far to say that this reserved right of approval will justify the Commission in reopening the record for the introduction of new and different facts having no relation to that question. In saying this much, we do not wish to be understood as implying that the Commission may not, upon a showing of newly discovered evidence or upon a showing of supervening facts which go to the very right of the applicant to have a license, remake the record in those respects without the necessity of a bill of review or other like technical methods of bringing into the record new and previously undiscovered facts, but there should be some control of the exercise of this right, and we think control is of neces-

sity lodged in this court. But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court.

While it is true the authority to grant is exclusive in the Commission, and while it is also true, as we have said before, that the license conferred on the owner of a radio broadcasting station is permissive only and within the power of the Commission by congressional 34 delegation, we cannot consent to the view that either the right to grant or the right to revoke is subject to the uncontrolled discretion of that tribunal. In granting licenses, the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer unlimited power. *Nelson Bros. Co. v. Federal Radio Commission*, 289 U. S. 266. When an applicant for a station who is qualified as to citizenship and otherwise has submitted his cause to the Commission and the Commission in denying the application has filed, as the Act requires and as we have time and again insisted should be done, "a full statement in writing of the facts and grounds for its decision" and an appeal as authorized by law is taken to this court, and the decision of the Commission reversed and the cause remanded for proceedings in accordance with our opinion and order, it is the duty of the Commission to comply with that order and, unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in the light of this court's opinion.

Here, as we have pointed out, petitioner was first in the field. Its application was duly set down for hearing and was duly heard by the Commission on the record made. This was in accordance with the Commission's Rule 106.4,^{*} which recognizes priority of filing when subsequent applications are made after the prior one has been set for hearing. In such a case petitioner ought not now to be put in any worse position than it occupied on the original hearing, and therefore ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing. On this state of facts, we are of opinion the Commission should rehear the application on the record and in the light of our opinion. We believe that this expression of our views on the subject will obviate the necessity of issuing the writ. If it becomes necessary for the protection of petitioner's rights, counsel may submit a proposed form of order within 30 days. Otherwise an order will be entered denying the petition for prohibition and mandamus.

Judgment suspended for 30 days.

^{*}Now Sec. 12.21 of the Commission's Rules of Practice and Procedure.

30

FEDERAL COMMUNICATIONS COMMISSION

35

Memorandum

Federal Communications Commission's Petition for Rehearing and Motion for Entry of Judgment and for Stay of Execution, Filed April 20, 1939.

36

Memorandum

Intervener Schuylkill Broadcasting Company's Petition for Reconsideration and Revision of Opinion, Filed April 20, 1939.

37 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion of petitioner for order for issuance of writ of mandamus and for suspension of action re writ of prohibition

Filed May 1, 1939

It appearing that the Federal Communications Commission has not complied, and does not intend to comply, with the opinion rendered herein by this Court on April 8, 1939, on the petition of The Pottsville Broadcasting Company for writs of prohibition and mandamus, and that the thirty-day period is about to expire which is provided therein for the submission of a proposed form of order (if an order should become necessary for the protection of petitioner's rights), the petitioner, by its counsel, in order to protect its rights, now moves that this Honorable Court enter an order for the issuance of the writ of mandamus as prayed in the petition and that action upon the prayer for a writ of prohibition be suspended until further order of the Court, and to this end, and pursuant to the suggestion of the Court, counsel submit with this motion a proposed form of Order.

ELIOT C. LOVETT,
CHARLES D. DRAYTON,
Counsel for Petitioner.

Receipt of a copy of the foregoing Motion, together with the proposed form of Order, acknowledged this 1st day of May 1939.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.
PHILIP G. LOUCKS,
Counsel for Schuylkill Broadcasting Company.

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order granting writ of mandamus

This cause came on for hearing on the petition of The Pottsville Broadcasting Company for a writ of prohibition and a writ of mandamus and upon the answer of the Federal Communications Commission and the petitioner's reply thereto, and the cause having been fully argued by counsel and the briefs of the parties considered, and it appearing to the Court—

1. That the Court entered its judgment herein on May 9, 1938, reversing the order of the Federal Communications Commission and remanding the case for reconsideration by the Commission on a question of secondary, rather than primary, importance having to do with the establishment by the Commission of a policy concerning the grant of "local" station licenses to local people, and the application of such a policy with substantial uniformity;

2. That on May 23, 1938, petitioner (then appellant) filed with the Commission a petition for the granting of its application for a permit to construct a radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power, from which petition it appears that the Commission has not established a policy requiring the majority stockholder of a corporate applicant for a "local" station to be a resident of the area to be served, but has consistently pursued a contrary policy, both before and after the decision of the Court herein, and has evidenced its intention

39 of continuing such contrary policy; that since petitioner's application is not for a "local," but for a "regional," station, the question is not pertinent in any event, and consequently there is nothing more to be considered by the Commission; that the Commission and this Court has found petitioner to be otherwise qualified and has determined that there is a public need for the radio station at Pottsville; that the Commission denied the said petition for the grant of the application on June 9, 1938, and at the same time entered an order for a reargument on petitioner's application to be heard along with two subsequently filed applications seeking the same facilities at Pottsville, said applications having not been fully heard by the Commission and the records relating thereto never having been before this Court; and that the Commission advised petitioner that it would consider these three applications "individually on a comparative basis, the application which in the judgment of the Commission will best serve the public interest to be granted;"

3. That on July 1, 1938, petitioner filed with this Court its verified petition setting forth the facts above stated and praying, inter alia, for the issuance of a writ of prohibition directed to the Federal Com-

munications Commission and the members thereof to prohibit the aforesaid action by the Commission, and also for writ of mandamus to require the Commission to render a decision in this case in conformity with the judgment heretofore rendered by this Court;

4. That the Commission agreed to withhold its contemplated consideration of petitioner's application and the two applications for the same facilities in Pottsville pending final determination of the case, thereby making it unnecessary for the Court then to take action on the prayers for rules to show cause; that the Court thereupon ordered a hearing upon the petition; and that a hearing was held on January 10, 1939;

40 5. That on April 3, 1939, this Court rendered an opinion recognizing the validity of the grounds urged in support of the aforesaid petition and stated that the Commission should reconsider the application on the record and in the light of the opinion;

6. That the petition for rehearing filed herein by the Commission on April 20, 1939, and denied by this Court on May —, 1939, clearly shows that the Commission has refused to reconsider the application on the record and in the light of our opinion, and will continue to refuse compliance therewith;

7. That there has been no showing of newly discovered evidence or of supervening facts which go to the very right of the petitioner to have a radio station license, and that no leave of this Court has been asked or obtained to that end;

8. That the need for the station, and the legal and technical qualifications of the petitioner, were initially recognized and found by the Commission; that this Court held that petitioner was also financially qualified; that the Commission has pursued and continues to pursue a policy of granting licenses for "local" stations to corporations in which the majority stockholder is not a resident of the community to be served, and proposes no change respecting such policy; and that petitioner's application concerns a "regional" station which would not be affected by any proposal to establish a new policy as to "local" stations;

9. That the established facts compel the conclusion that the statutory criterion of public interest, convenience, and necessity will be met by granting the application; and that the Commission is therefore without further discretion in the matter, and is under the statutory duty of granting the petitioner's application;

41 It is this — day of May, 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof, namely, Frank B. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

It is further ordered that, pending action by the Federal Communications Commission in the light of the issuance of the writ of mandamus, action by the Court upon the petition for a writ of prohibition be and is postponed.

By the Court:

_____, Chief Justice.

42 In United States Court of Appeals for the District of Columbia

No. 7016

THE POTTSVILLE BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION; SCHUYLKILL BROADCASTING
COMPANY, INTERVENER, APPELLEES

Opinion on petitions for rehearing

Filed May 5, 1939

[File endorsement omitted.]

PER CURIAM:

After due consideration, the court is of the view that it should adhere to the opinion announced in this case April 3, 1939. For that reason, the petition of Federal Communications Commission for rehearing is denied.

First. The court has carefully examined the decision of the Supreme Court in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, and can find nothing there in conflict with the opinion in this case.

Second. The petition for rehearing of Schuylkill Broadcasting Company, Intervener, in the same case, is also denied. The opinion of this court expressly held that the reconsideration by the Commission should be on the record originally considered. Whatever rights Schuylkill then, as intervener, was entitled to assert, it is entitled to assert now. No more was said in the opinion than that Schuylkill's own record on its application, which was made subsequent to the hearing by the Commission on the Pottsville Company's application, could no more be considered now than under the Commission's rule at the time of the Commission's original hearing on Pottsville's application.

The Commission having intimated a desire to apply to the Supreme Court, the writ of mandamus will issue as prayed but will be stayed for thirty days from this date.

MAY 5, 1939.

43 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

Motion for clarification of per curiam decision of May 5, 1939

Filed May 12, 1939

To the Honorable, the CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF
THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA:

Comes now the Federal Communications Commission and moves this Honorable Body to clarify its per curiam decision of May 5, 1939, in this case and in support of this motion shows the following:

1. The decision of this Court rendered in this case on May 5, 1939, denied respondent's Petition for Rehearing filed on April 20, 1939 and concluded with the following statement: "The Commission having intimated a desire to apply to the Supreme Court, the writ of mandamus will issue as prayed but, will be stayed for thirty days from this date."

2. The respondents are unable to determine from the Court's Decision of May 5, 1939 precisely what the writ of mandamus, which this Court will issue, will order respondents to do. It is respectfully submitted that the Court's statement that the writ of mandamus will issue "as prayed" requires clarification for the reasons stated in the following paragraphs.

3. The Petition for Writ of Mandamus filed by the petitioner on July 2, 1938 contains the following prayer:

"WHEREFORE, the premises considered, your petitioner prays:

3. For a writ of mandamus to be issued from this Honorable Court directed to the Federal Communications Commission and the members thereof commanding them (a) to render a decision in this case within a time certain, to be fixed by this Court, and in conformity with the judgment heretofore rendered by this Court; (b) to base the decision on the one question of policy as to which the case was remanded for reconsideration by the Commission; and (c) to grant the application of your petitioner on this record, as submitted to and considered by this Court;"

44 4. This Court by its decision of April 3, 1939, decided this case in favor of the petitioner and stated in its opinion: "If it becomes necessary for the protection of petitioner's rights, counsel may submit a proposed form of order within thirty days."

5. Petitioner, on May 1, 1939, within thirty days from this Court's decision of April 3, 1939, filed a motion praying this Court to enter an order for the issuance of a writ of mandamus and submitted a proposed form of order as follows:

"It is this — day of May 1939 ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal

Communications Commission and the members thereof, namely Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; * * *

6. Since the basic question in this case is the extent and nature of the power of this Court to direct respondents' action in connection with further proceedings on petitioner's application (for construction permit for radiobroadcast station), it is essential, if the case is to be properly presented to the Supreme Court of the United States for review, that there be no possibility of doubt as to precisely what this Court is ordering respondents to do. Counsel for respondents herein inquired of the Clerk of this Court whether the Court's decision of May 5, 1939, means that the writ of mandamus will issue directing the Commission to perform the acts requested in the petition filed July 2, 1938, or the acts specified in the proposed order submitted by petitioner on May 1, 1939, or will require the Commission to perform certain acts different from those requested either in said petition or specified in said proposed order. The Clerk of this Court was unable to inform counsel in the premises and accordingly this motion is filed requesting the Court to clarify its decision of May 5, 1939.

45 Wherefore, respondents pray the Court to clarify its decision of May 5, 1939, by specifying what the writ of mandamus will contain or, in the alternative, for the Court actually to issue said writ but postpone its effective date pending application by respondents to the Supreme Court for writ of certiorari or other appropriate relief.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,
By William J. Dempsey,
WILLIAM J. DEMPSEY,
General Counsel.
William C. Koplovitz,
WILLIAM C. KOPLOVITZ,
Asst. General Counsel.

No objection to the within motion is interposed by The Pottsville Broadcasting Company, petitioner or Schuylkill Broadcasting Company, intervener.

ELIOT C. LOVETT,
Counsel for the Pottsville Broadcasting Company,
Petitioner.

ARTHUR W. SCHARFELD,
Counsel for Schuylkill Broadcasting Company,
Intervener.

46 In United States Court of Appeals for the District of Columbia

[Title omitted.]

[File endorsement omitted]

Answer to motion for clarification

Filed May 13, 1939

The Pottsville Broadcasting Company, petitioner herein, interposes no objection to the motion of the Federal Communications Commission for clarification of the per curiam decision rendered on May 3, 1939, but, by way of answer, submits the following paragraphs as alternative suggestions in lieu of the paragraph immediately following paragraph numbered nine in the proposed form of Order which petitioner presented to the Court on May 1, 1939, pursuant to its decision of April 3, 1939:

ALTERNATIVE NO. 1

It is this — day of May 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof—Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely, (a) to reverse the finding of the Commission that The Pottsville Broadcasting Company is not financially qualified to construct the proposed station, (b) to reverse the finding of the Commission that the public interest, convenience, and necessity would not be served by granting the application of The Pottsville Broadcasting Company, and (c) to grant the application of The Pottsville Broadcasting Company for a permit to construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

47

ALTERNATIVE NO. 2

It is this — day of May 1939, ordered that the writ of mandamus issue out of and under the seal of this Court directed to the Federal Communications Commission and the members thereof—Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely (a) to find that The Pottsville Broadcasting Company is financially qualified to construct the proposed station, (b) to find that the granting of the application of The Pottsville Broadcasting Company will serve the public interest, convenience, and necessity, and (c) to grant the application of The Pottsville Broadcasting Company for a permit to

construct a new radio broadcasting station to operate daytime only in Pottsville, Pennsylvania, on 580 kilocycles with 250 watts power; and

Respectfully submitted.

THE POTTSVILLE BROADCASTING COMPANY,
By ELIOT C. LOVETT,
CHARLES D. DRAYTON, *Its Counsel.*

Receipt of a copy of the foregoing Answer acknowledged this 13th day of May, 1939.

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.
ARTHUR W. SCHARFELD,
Counsel for Schuylkill Broadcasting Company.

48 In United States Court of Appeals for the District of
Columbia

[Title omitted.]

[File endorsement omitted.]

Order for issuance writ of mandamus

Filed May 15, 1939

This cause came on to be heard upon the petition for a writ of mandamus, the answer of the respondent, and the reply of the petitioner; and after hearing counsel, and the court being fully advised in the premises, it is ordered, adjudged, and decreed by the Court that a writ of mandamus issue out of and under the seal of this Court, directed to the Federal Communications Commission and the members thereof, namely, Frank R. McNinch, Norman S. Case, T. A. M. Craven, George Henry Payne, Frederick I. Thompson, Thad H. Brown, and Paul A. Walker, and their successors in office, commanding them and each of them forthwith to carry out the judgment of this Court, namely, (a) to set aside the order of the Federal Communications Commission dated June 9, 1938, which denied the application of petitioner, Pottsville Broadcasting Company, and designated said application for hearing on a comparative basis with the applications of the Pottsville News and Radio Corporation and of the Schuylkill Broadcasting Company, and (b) to hear and reconsider the application of petitioner, Pottsville Broadcasting Company, on the basis of the record as originally made and in accordance with the opinions of this Court in this cause filed on May 9, 1938, and on April 3, 1939.

The issuance of the writ will be stayed for thirty days.

PER CURIAM.

Dated May 15, 1939.

In United States Court of Appeals for the District of
Columbia

[Title omitted.]

[File endorsement omitted.]

Designation of record

Filed June 5, 1939

The clerk will please prepare a transcript on application to the Supreme Court of the United States for certiorari in the above-entitled cause, including therein the following:

1. This Court's opinion in Pottsville Broadcasting Company, appellant v. Federal Communications Commission; Schuylkill Broadcasting Company, intervener, appellees, rendered on May 9, 1938.

2. This Court's judgment in the same case, filed May 9, 1938.

3. The Pottsville Broadcasting Company's petition for writ of prohibition and for writ of mandamus, but excluding brief in support thereof, filed with this Court on July 2, 1938.

4. Opposition of Federal Communications Commission to petition of Pottsville Broadcasting Company for a rule to show cause why a writ of prohibition and writ of mandamus should not issue, but excluding brief in support thereof, filed July 12, 1938.

5. Opposition of Schuylkill Broadcasting Company to the petition of the Pottsville Broadcasting Company for issuance of writs of prohibition and mandamus to the Federal Communications Commission, filed July 25, 1938.

50. 6. Minute entry of argument of January 10, 1939.

7. This Court's opinion in Pottsville Broadcasting Company v. Federal Communications Commission; Schuylkill Broadcasting Company, intervener, appellees, rendered on April 3, 1939.

8. Minute entry of Federal Communications Commission's petition for rehearing and motion for entry of judgment and stay of execution, filed on April 20, 1939.

9. Minute entry of Schuylkill Broadcasting Company's petition for reconsideration and revision of opinion, filed on April 20, 1939.

10. The Pottsville Broadcasting Company's motion for order for issuance of writ of mandamus and for suspension of action re writ of prohibition, and accompanying order, filed May 1, 1939.

11. This Court's per curiam order filed on May 5, 1939, directing that the writ of mandamus will issue as prayed but will be stayed for 30 days.

12. Federal Communications Commission's motion for clarification of per curiam decision of May 5, 1939.

13. Pottsville Broadcasting Company's answer to Federal Communications Commission's motion for clarification.

14. This Court's per curiam order of May 15, 1939, containing the terms of and ordering the issuance of a writ of mandamus.

15. This designation.

Robert H. Jackson,
ROBERT H. JACKSON,
Solicitor General.

51 Service of copy of Designation of Record acknowledged this
— day of June 1939.

Counsel for Pottsville Broadcasting Company.

Counsel for Schuylkill Broadcasting Company.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States*Order allowing certiorari***Filed October 9, 1939**

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.